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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW DEGROFF, Defendant and Appellant.	C089753 (Super. Ct. No. 07F00393)

In 2009 a jury found defendant Matthew DeGroff guilty of second degree murder (Pen. Code, § 187, subd. (a)),[1] and found true the allegations that he intentionally and personally discharged a firearm proximately causing the death of his victim (§ 12022.53, subd. (d)) and personally used a firearm (§ 12022.5, subd. (a)(1)). We affirmed the resulting conviction in 2011. (*People v. DeGroff* (June 13, 2011, C062211) [nonpub.

[1] Further undesignated statutory references are to the Penal Code.

opn.].)[2] In our prior opinion, we explained that the jury found defendant guilty of murder "for shooting and killing his girlfriend in the home they lived in together," after defendant testified that he "fired [a] gun twice" at the victim. (*DeGroff, supra,* C062211 [at pp. 1, 10].)

In 2019 defendant filed a petition for resentencing under newly enacted section 1170.95. The trial court found defendant ineligible for relief in a brief written order, entered without eliciting any response from the People or holding a hearing.

Defendant timely appealed and now contends the trial court erred by denying the petition without first appointing counsel. We disagree, and therefore affirm the trial court's order.

LEGAL BACKGROUND

Senate Bill No. 1437 and Section 1170.95

"Under prior California law, a defendant who aided and abetted a crime, the natural and probable consequence of which was murder, could be convicted not only of the target crime but also of the resulting murder. (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) This was true irrespective of whether the defendant harbored malice aforethought. Liability was imposed ' "for the criminal harms [the defendant] . . . naturally, probably, and foreseeably put in motion." [Citations.]' (*Id*. at pp. 164-165, italics omitted.)" (*In re R.G.* (2019) 35 Cal.App.5th 141, 144.)

On September 30, 2018, the Governor signed Senate Bill No. 1437 (2017-2018 Reg. Sess.). Senate Bill No. 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder

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[2] We grant the People's request that we take judicial notice of our opinion affirming the judgment of conviction and sentence in defendant's direct appeal. (Evid. Code, §§ 459, subd. (a) ["The reviewing court may take judicial notice of any matter specified in Section 452"], 452, subd. (d) [permitting a court to take judicial notice of records of "any court of this state"].)

liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Effective January 1, 2019, the legislation amended sections 188 and 189 and added section 1170.95 to the Penal Code.

Senate Bill No. 1437 "redefined 'malice' in section 188. Now, to be convicted of murder, a principal must act with malice aforethought; malice can no longer 'be imputed to a person based solely on [his or her] participation in a crime.' (§ 188, subd. (a)(3).)" (*In re R.G., supra,* 35 Cal.App.5th at p. 144.)

The new section 1170.95 permits those convicted of felony murder or murder under the natural and probable consequences doctrine to petition the sentencing court to vacate the conviction and to be resentenced on any remaining counts where: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).)

Once a complete petition is filed, section 1170.95, subdivision (c) sets out the trial court's responsibilities: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

PROCEDURAL BACKGROUND

Defendant's Petition to Vacate Conviction

In February 2019 defendant filed a petition to vacate his conviction pursuant to section 1170.95 and attached a declaration, the abstract of judgment of his underlying conviction, and jury instructions from his trial. In his petition, defendant stated (1) a complaint, information, or indictment was filed against him that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine, (2) at trial, he was convicted of first or second degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine, and (3) he could not be convicted of first or second degree murder under the changes to sections 188 and 189. Defendant also requested the trial court appoint counsel for him "during th[e] re-sentencing process."

The record on appeal does not show that the prosecution responded substantively to defendant's petition.

Trial Court Order

In May 2019 the trial court summarily denied defendant's petition. The court concluded that defendant did "not show[ ] that he falls within the provisions" of section 1170.95. First, the trial court explained that defendant "was convicted . . . solely on a malice aforethought theory," as "[n]o jury instruction was given on either a felony-murder or a natural and probable consequences doctrine theory." Second, the trial court ruled that "according to" our prior opinion, "the evidence shows that defendant . . . was the only perpetrator and had himself admitted shooting the victim." Thus, the trial court concluded defendant "[was] not eligible for any relief under" section 1170.95.

Defendant filed a timely appeal from the trial court's order denying his petition.

DISCUSSION

I

Summary Denial of Section 1170.95 Petition Without Appointment of Counsel

Defendant contends the trial court erred by summarily denying his petition before appointing counsel. He argues that because his petition "met the statutory requirement of eligibility for relief, the trial court erred by failing to appoint counsel and conduct a hearing on the allegations of the petition." (Fn. omitted.) His petition met the statutory requirements, defendant maintains, because of the "assertion that he was convicted under the doctrine of natural and probable consequences," which assertion "was supported by" the jury instruction on murder with malice aforethought that defendant attached to his petition (and which was used at his trial). That instruction (CALCRIM No. 520), defendant observes, "provides that the defendant may be convicted of second degree implied malice murder if (1) he intentionally committed an act, (2) '[t]he *natural consequences* of the act were dangerous to human life,' (3) the defendant knew his act was dangerous to human life, and (4) he deliberately acted with conscious disregard for human life." (Italics added.)

Because "there was no requirement that the jurors be unanimous on the theory of murder liability, and there is nothing in the record that suggests that the verdict was based on express rather than implied malice murder," defendant argues, the jury verdict in the underlying prosecution "could have been based on" the natural and probable consequences doctrine.

The People argue defendant was not convicted of second degree murder under the natural and probable consequences doctrine, because "[t]he words 'natural consequences' in the jury instruction on malice does not employ the natural and probable consequences doctrine, despite the use of similar language." And because defendant was "indisputably ineligible for relief under section 1170.95, the trial court was under no obligation to appoint counsel, review briefing or conduct a hearing on [defendant's] unmeritorious

claim." Requiring appointment of counsel "where a petitioner has simply stated each [statutory] requirement, whether true or not, would exalt form over substance," the People maintain.

The People also argue that any error by the trial court in failing to appoint counsel was harmless.

We conclude the trial court properly denied the petition without first appointing counsel or conducting a hearing, because the record of conviction demonstrates as a matter of law, that defendant (1) was *not* convicted pursuant to the natural and probable consequences doctrine, and (2) defendant was the "actual killer." Accordingly, we need not consider the parties' arguments regarding harmless error and prejudice.

A. *Standard of Review*

"Because this contention involves a question of statutory construction, our review is de novo. [Citation.] Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them 'their usual and ordinary meaning.' [Citation.] 'The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citations.] 'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.]" (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388.)

B. *Analysis*

Two recently published cases concluded that section 1170.95, subdivision (c) requires the trial court to make two *separate* prima facie determinations: one *before* appointing counsel and receiving briefing, and one after those procedural steps have been taken. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 327-329, review granted Mar. 18, 2020, S260493 (*Verdugo*); *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137, review granted Mar. 18, 2020, S260598 (*Lewis*).) We agree.

"The first sentence of section 1170.95, subdivision (c), directs the court to review the petition and determine if the petitioner has made the requisite prima facie showing. The second sentence provides, if the petitioner has requested counsel, the court must appoint counsel to represent him or her. The third sentence requires the prosecutor to file and serve a response to the petition within 60 days of service of the petition and permits the petitioner to file a reply to the response. The structure and grammar of this subdivision indicate the Legislature intended to create a chronological sequence*: first, a prima facie showing; thereafter, appointment of counsel for petitioner*; then, briefing by the parties. ([*Lewis*], *supra*, 43 Cal.App.5th at pp. 1139-1140 ['[w]hen the statutory framework is, overall, chronological, courts will construe the timing of particular acts in relation to other acts according to their location within the statute; that is, actions described in the statute occur in the order they appear in the text']; [Citations.]" (*Verdugo, supra*, 44 Cal.App.5th at p. 332, rev. granted, italics added.)

Thus, if a petitioner does not make a prima facie showing that he or she "falls within the provisions of" section 1170.95, the trial court may deny the petition summarily without first appointing counsel or holding a hearing.

Here, the trial court correctly ruled that defendant did not make a prima facie showing that he fell within the provisions of section 1170.95, because the record of conviction (including our prior opinion) demonstrated without a doubt that defendant was *not* "convicted of 1st or 2nd degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine."[3] (§ 1170.95, subd. (a)(2).)

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[3] Contrary to defendant's assertion that our prior opinion, while "useful . . . is not the record of the trial itself," we agree with other courts that, when considering section 1170.95 petitions, trial courts can indeed rely on a reviewing court's opinion as part of the record of the underlying conviction. (See *Lewis, supra*, 43 Cal.App.5th at p. 1138 [permitting the trial court to consider its file and the record of conviction before appointing counsel in a section 1170.95 proceeding is "sound policy" " 'when even a cursory review of the court file would show as a matter of law that the petitioner is not

This is so because, "[c]ontrary to defendant's suggestion, the use of the term 'natural consequences' in the CALCRIM No. 520 definition of implied malice does *not import* into the crime of murder the case law relating to the *distinct* 'natural and probable consequences' doctrine developed in the context of aiding and abetting liability." (*People v. Martinez* (2007) 154 Cal.App.4th 314, 334, italics added.)

Indeed, application of the natural and probable consequences doctrine to defendant would have been nonsensical, as "culpability under the natural and probable consequences doctrine is vicarious" (*People v. Chiu, supra*, 59 Cal.4th at p. 164) and when the defendant is the sole perpetrator, his or her liability for a crime is, by definition, not vicarious. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 901 ["The natural and probable consequences doctrine applies . . . to aiders and abettors and conspirators"]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123 ["The actual perpetrator must have whatever mental state is required for each crime charged" but "the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense"].)

Furthermore, the trial court correctly denied the petition on the independent ground that defendant was the "only perpetrator" of the murder, and therefore ineligible for section 1170.95 relief because he was the "actual killer." (Stats. 2018, ch. 1015, § 1, subd. (f).) (See *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 ["The jury convicted [defendant] of second degree murder and found true that he personally and intentionally used a firearm to commit the crime," thereby "implicitly [finding] [defendant] was the

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eligible for relief" "], rev. granted; *Verdugo, supra*, 44 Cal.App.5th at p. 333, rev. granted.)

Thus, the trial court properly considered our prior opinion when it denied defendant's petition.

'actual killer,' " rendering "the changes to sections 188 and 189 . . . inapplicable"], review granted Mar. 18, 2020, S260410.)

DISPOSITION

The order denying defendant's petition is affirmed.

/s/
RAYE, P. J.

We concur:

/s/
BLEASE, J.

/s/
MURRAY, J.